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No. 01-164

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE RELEVANT STATUTE	1
ARGUMENT	1
THIS COURT HAS JURISDICTION OVER THIS CASE	1
A. The Court Has Jurisdiction Over The Judgment Of An Intermediate State Appellate Court When The Highest Court Of The State Declines To Review That Judgment	1
B. The Superior Court's Judgment Qualifies For Review Under § 1257	3
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases:

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 3

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 5

American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976) 10

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 8

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 3

Burlington Northern R.R. Co. v. Ford, 504 U.S. 648 (1992) 7, 8

Clinton v. Jones, 520 U.S. 681 (1997) 8

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ..... *passim*

Duquesne Light Co. v. Barasch, 488 US. 299 (1989) .. 3

Eichel v. New York Central Railroad Co., 375 U.S. 253 (1963) 5, 6, 7

Florida v. Thomas, 121 S. Ct. 1905 (2001) 9

Table of Authorities

	Page
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)	10
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	3, 6
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968)	2
Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997)	3, 9
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)	2
Mills v. Alabama, 384 U.S. 214 (1966)	6
Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988)	5
National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)	5
Norfolk & Western R.R. Co. v. Liepelt, 444 U.S. 490 (1980)	6
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	8
Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776 (7th Cir. 2000)	2
Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935)	2

Table of Authorities

	Page
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 (1953)	7
Republic National Gas Co. v. Oklahoma, 334 U.S. 62 (1998)	8
Southland Corp. v. Keating, 465 U.S. 1 (1984)	10
Switzerland Cheese Assn. v. E. Horne's Market, Inc., 385 U.S. 23 (1966)	3
United States Constitution:	
First Amendment	7
Statutes:	
Supreme Court Case Selection Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988)	4
28 U.S.C. § 1257	*passim*
28 U.S.C. § 1257(a)	1
28 U.S.C. § 1291	3
28 U.S.C. § 1292(a)(1)	3
42 U.S.C. § 1983	9

Table of Authorities

Page

Rules:

Pa. R. App. P. 1112 2

Pa. R. App. P. 1112(a) 9

Pa. R. App. P. 1112(b) 9

Other Authority:

R. STERN, E. GRESSMAN, S. SHAPIRO, & K. GELLER, SUPREME COURT PRACTICE (7th ed. 1993) 2, 9

Petitioner National Railroad Passenger Corporation ("Amtrak") respectfully submits this brief in reply to respondent's brief in opposition to Amtrak's petition for a writ of certiorari. Pursuant to Rule 15.6, Amtrak will limit this brief to the new points raised by respondent, *i.e.*, his claim that this Court lacks jurisdiction over this matter because: (1) the decision of the Superior Court of Pennsylvania is not a decision of the highest court of that State; and (2) the judgment of the Superior Court is not a final order within the meaning of 28 U.S.C. § 1257. Both of those arguments should be rejected.

THE RELEVANT STATUTE

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of the statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

ARGUMENT

THIS COURT HAS JURISDICTION OVER THIS CASE

A. The Court Has Jurisdiction Over The Judgment Of An Intermediate State Appellate Court When The Highest Court Of The State Declines To Review That Judgment

Respondent claims that jurisdiction is lacking because Amtrak has sought certiorari from the decision of the Superior Court of Pennsylvania, which is not the highest court of that State. This argument is totally meritless and the cases cited by respondent to support it — both of which were reviewing

decisions by lower *federal* courts — have literally nothing to do with this issue or § 1257.[1]

After the Superior Court entered its judgment, Amtrak had no automatic right of appeal to the Supreme Court of Pennsylvania. Rather, Amtrak had to seek permission for an appeal by filing a petition of allowance of appeal with the Supreme Court of Pennsylvania. Pa. R. App. P. 1112. Amtrak filed a timely petition, which was denied without comment by the Supreme Court of Pennsylvania. Thus, Amtrak exhausted its appellate opportunities in Pennsylvania.

It is now well-settled that where the highest court of a state declines to exercise its authority to review the decision of an intermediate state court, this Court has jurisdiction over the judgment of the intermediate court. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954); R. STERN, E. GRESSMAN, S. SHAPIRO, & K. GELLER, SUPREME COURT PRACTICE § 3.12 at 115 (7th ed. 1993) [hereinafter cited as "SUPREME COURT PRACTICE"] ("Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under § 1257.").[2]

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1. *See Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (affirming *federal* district court's denial of an injunction sought to enjoin enforcement of a Department of Agriculture order concerning proper containers for fruit); *Nutrasweet Co. v. X-L Eng'g Co.*, 227 F.3d 776 (7th Cir. 2000) (affirming judgment entered by *federal* district court in an environmental contamination case).

2. Also meritless is respondent's claim that the petition should have been sought from the Supreme Court of Pennsylvania's order instead of the Superior Court's judgment. "An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction." SUPREME COURT PRACTICE § 3.13 at 115-16. *See, e.g., Michigan-Wisconsin Pipe Line Co.*, 347 U.S. at 159-60 (where Supreme Court of Texas declined to review decision of Texas Court of Civil Appeals, this Court had jurisdiction over judgment of Court of Civil Appeals and not that of Supreme Court of Texas).

B. The Superior Court's Judgment Qualifies For Review Under § 1257

Respondent claims that the Superior Court's judgment is not a final judgment under § 1257 because it remanded the case for a new trial.[3] Although § 1257 could be read literally to preclude review where anything further remains to be determined by a state court, this Court has never administered the statute in such a mechanical fashion. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Recognizing that there are circumstances which require a departure from the requirement of finality, this Court has often "taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* Indeed, "the totality of these exceptions certainly indicates that the Court has been willing to impart to the language 'final judgment or decree' a great deal of flexibility." *Id.* at 506 (Rehnquist, J., dissenting). Decisions subsequent to *Cox* have continued to apply the finality requirement in a flexible manner. *E.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989) ("[I]n practice, the final judgment rule has not been interpreted so strictly."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (applying a "pragmatic approach" to the question of finality).

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3. Most of the cases cited by respondent do not even come close to supporting this proposition. In fact, most of them do not even involve § 1257 because they are appeals arising from federal rather than state court decisions. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (federal trial court's decision on the merits is final for purposes of 28 U.S.C. § 1291 even though amount of attorney's fees due to plaintiff had not been determined); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam) (federal trial court's decision to order a new trial was not a final, appealable order and could not be reviewed by a writ of mandamus); *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966) (federal trial court's decision to deny a summary judgment motion seeking a preliminary injunction was not immediately appealable under 28 U.S.C. § 1292(a)(1)). The only case cited by respondent that deals with § 1257 is *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997), which is discussed below.

The 1988 amendments to § 1257 allow this Court to take an even more flexible approach to § 1257 than that permitted by *Cox*. Prior to the Supreme Court Case Selection Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988), § 1257 allowed state court decisions to be appealed *as of right* whenever the state court: (1) found a federal statute or treaty invalid; or (2) rejected a federal constitutional or statutory challenge to a state statute. Because these automatic appeals placed a severe burden on the Court's finite time, it is not surprising that some of this Court's § 1257 decisions interpreted § 1257 restrictively in order to cut back on the steady stream of state court cases automatically sent to this Court. That problem has been eliminated by the 1988 amendments, which eliminated all appeals as of right, and now all state court cases come to this Court via the certiorari procedure, thereby giving this Court the opportunity to pick and choose the cases that are worthy of its review.

In any event, under *Cox's* flexible approach to § 1257, this Court should review a state court judgment, even though it remands the case for a new trial, where, as here:

- the federal issue on which certiorari is sought has been finally and conclusively resolved by the state courts
- the federal issue presented is one of considerable importance that affects thousands of other cases pending under the same federal statute;
- this Court has not addressed that federal issue in 38 years
- the state court plaintiff's cause of action arises under a federal statute and does not require this Court (1) to intervene in any state affairs or matters of local concern or (2) to become unnecessarily embroiled in any federal constitutional issues, and
- the underlying judgment of the trial court is clearly a final judgment that has disposed of all claims and issues as to all parties

Cox and its progeny recognize that a state court judgment, even if it contemplates further proceedings in the state courts, qualifies for review under § 1257 if "there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Cox*, 420 U.S. at 478-79.[4] That is also the situation here. To begin with, there is no question that the state court here finally determined the question on which certiorari is sought. The Superior Court has conclusively determined that this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per

4. This case presents a far more compelling case for jurisdiction than *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), where this Court concluded that it had jurisdiction to review whether a pre-trial motion to amend should be granted. There, a maritime worker filed suit in New York state court for injuries he suffered while working on a ship. The trial court denied his pre-trial motion to amend his complaint to add his spouse as a plaintiff for loss of society because such a claim was not allowed by the controlling federal law. The New York appellate courts disagreed and ruled that federal law allowed the spouse to assert such a claim. Despite the fact that this pre-trial ruling was clearly interlocutory and did not readily fit into any of the exceptions to § 1257 finality enunciated in *Cox*, *id.* at 277, this Court nevertheless exercised jurisdiction over the case. Although the case had been tried and resulted in a verdict for the plaintiff and his spouse *after* certiorari had been granted, the defendant's appeal of the verdict was still pending in state court and thus the case was clearly not final in any sense of the word. Nevertheless, because the federal issue as to the viability of the spouse's claim had been finally decided by the state court, the Court concluded that it made sense to address the question presented rather that send the case back with the issue undecided. *Id.* at 277-79. The same result should obtain here. *See also Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 n.11 (1988) (finding jurisdiction under § 1257 over non-final state court judgment because federal question had already been answered by state court and was therefore ripe for review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (finding jurisdiction under § 1257 over non-final state court order denying stay of injunction pending appeal in the state court system because state court order had conclusively answered federal question presented).

curiam) prohibits: (1) a railroad in a FELA action from introducing evidence that a railroad employee is eligible to receive retirement benefits at age 60 in order to rebut a claim that the railroad worker would have worked until age 65 or 70; and (2) a trial court from employing a balancing analysis to determine whether the probative value of such evidence outweighs any prejudicial impact.

To require Amtrak to return to the state courts and try the entire case again and appeal it up the state court system again before it can bring these important federal issues to this Court would be a significant waste of the litigants' and state courts' resources. If Amtrak convinces this Court after a second trip through the state court system that it is right on the *Eichel* issues, then a third trial would be required or the results of the first trial would be reinstated. Either way the second trial and resulting series of state court appeals would be a complete waste of time. This Court has always tried to avoid such an inefficient process when interpreting § 1257. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 217-18 (1966).

Moreover, a "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The federal policy implicated here is that damages awarded under the FELA should be "realistic" given the unique burden that the statute places upon the railroad industry. *See Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490, 493 (1980). Thousands of FELA lawsuits are filed every year, Petition at 9 n.4, and in many of those cases there is an issue as to the proper period of time for which future lost wages should be awarded. In this one case alone, the difference between retirement at age 60 and 70 amounts to almost $300,000. *See* Petition at 20 n.16. Multiplying that figure by the thousands of FELA cases filed every year easily demonstrates that this issue is worth millions of dollars every year to the railroad industry.[5]

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5. The impact on federal railroad policy seems just as significant as that found in *Goodyear Atomic Corp.*, 486 U.S. at 178-80. There, (Cont'd)

In *Cox*, this Court decided to review the First Amendment issues presented by a state court ruling that allowed a civil action by a father to proceed to trial against a reporter and television station for broadcasting a report about the rape of his daughter that mentioned her name. This Court did not believe the press should have to operate in the shadow of a state court ruling that allowed such a trial to go forward over First Amendment objections. 420 U.S. at 485-86. The same can be said here. The railroad industry should not have to litigate thousands of FELA cases every year under the shadow of the ruling by the Superior Court and other courts that FELA defendants are prohibited from introducing highly relevant evidence needed to rebut exaggerated and unrealistic claims for future lost wages. The federal and state trial courts confronting these issues are also entitled, after 38 years, to a determination by this Court on whether *Eichel* does in fact prohibit them from employing any balancing analysis in deciding whether to admit such evidence. This is particularly true given that, as even the court below admitted, *Eichel* does not directly address the issue raised in this case.[6]

(Cont'd)
the Court took jurisdiction over an interlocutory state court order allowing an injured worker's claim for additional workers' compensation benefit due to safety violations at a nuclear facility because the state court decision — if left unreviewed — might seriously erode federal policy in the area of nuclear production.

6. The importance of the FELA as a federal statute has been recognized by this Court in deciding issues under § 1257. In *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953), this Court held that it had jurisdiction over a state court judgment that had overruled a demurrer to a complaint seeking to enjoin a FELA action filed in another state. The unsuccessful demurrer had argued that the injunction sought was barred by a provision of the FELA that allowed a FELA plaintiff to file suit wherever the railroad was doing business. Even though the state court ruling was clearly not final, *id.* at 382, this Court took jurisdiction over the case, noting that the state court "had interpreted an important federal statute." *Id.* at 381. *See also Burlington Northern*
(Cont'd)

Moreover, declining jurisdiction in this case would not further the purpose of the finality requirement of § 1257, namely "limit review of state court determinations of federal *constitutional* issues to leave at a minimum federal intrusion in *state affairs*." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (emphasis added). *See also Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1998) ("This prerequisite for the exercise of the appellate powers of the Court is especially pertinent when a *constitutional* barrier is asserted against a state court's decision on *matters peculiarly of local concern*.") (emphasis added)

In this case, the Court would not be intruding into "state affairs." The question at hand concerns the scope of the FELA, a *federal* statute, which requires state courts to interpret and apply federal law, and thus it does not concern "matters peculiarly of local concern." Nor does this case present any constitutional question, and thus there is no reason to hesitate taking the case because of this Court's obligation to avoid constitutional questions unless absolutely necessary.[7] Thus, while it may be more appropriate to apply the § 1257 exceptions more strictly when state claims or constitutional issues are present, no such impediment is present here, where only a federal statute is at issue.

It also bears emphasis that the trial court's judgment in this case was unquestionably a final judgment under both federal and state law. The case was tried to a verdict and all post-trial motions were denied. There was nothing else for the trial court

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(Cont'd)

R.R. Co. v. Ford, 504 U.S. 648, 650 n* (1992) (finding jurisdiction under § 1257 where state trial court denied FELA defendant's pre-trial motion to change venue).

7. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 690 & n.11 (1997); *Cox*, 420 U.S. at 509-10 (Rehnquist, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

to do.[8] This critical fact distinguishes this case from other decisions of this Court that have declined jurisdiction because of the absence of a final judgment. In those cases, the trial court's order was clearly interlocutory and thus this Court would have had to intervene in on-going proceedings in a state trial court.[9] Indeed, in this sense, the judgment in this case is more worthy of review than other cases where this

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8. It is also significant that the Superior Court's judgment remanding for a new trial is considered to be a final order under Pennsylvania law. Only a "final order" of the Superior Court can be the subject of a petition for allowance of appeal to the Supreme Court of Pennsylvania. Pa. R. App. P. 1112(a). "A final order of the Superior Court . . . is any order that concludes an appeal, including an order that remands an appeal, in whole or in part, unless the appellate court remands and retain jurisdiction." Pa. R. App. P. 1112(b). In this case, the Superior Court did not retain jurisdiction. *See* 16a. Although not dispositive as to whether the Superior Court's judgment is final for purposes of § 1257, the fact that Pennsylvania considers that judgment to be a final order is a factor for the Court to consider. *See* SUPREME COURT PRACTICE § 3.3 at 93 ("The most pertinent source of inquiry as to finality, outside the judgment, opinion and order is the law of the state wherein the judgment was rendered.").

9. For example, in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), an Alabama trial court in a civil rights case denied a pre-trial motion by a city seeking a ruling that compensatory damages could not be awarded against it under 42 U.S.C. § 1983. It certified this interlocutory question to the Alabama Supreme Court, which reversed and held that only punitive damages could be awarded and remanded for further proceedings, including a trial on liability and damages for the § 1983 and state law claim plaintiff had filed. This Court declined to review this decision because it was "avowedly interlocutory" and "answered a single certified question that affected only two of the four counts in petitioners' complaint." 522 U.S. at 81. Thus, *Jefferson* was in a completely different procedural position than the case at bar. *See also Florida v. Thomas*, 121 S. Ct. 1905, (2001) (trial court granted motion to suppress evidence; defendant had yet to be tried).

Court has found finality under § 1257 since the trial court's order in those cases was also clearly interlocutory.[10]

CONCLUSION

For the reasons stated above, this Court has jurisdiction over this case and the petition for a writ of certiorari should be granted.

Respectfully submitted,

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10. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 53-56 (1989) (trial court granted pre-trial motion to dismiss two of eight charges; defendant had yet to be tried); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (trial court denied defendant's motion to arbitrate state statutory claims); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976) (trial court denied defendant's pre-trial motion to challenge venue); *Cox*, 420 U.S. at 1035-36 (trial court granted summary judgment on liability but damages still had to tried by jury).